No. 80-625

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALVIN J. SHAPIRO, et al.,
Petitioners,

vs.

MIDWEST RUBBER RECLAIMING COMPANY, MIDCON INDUSTRIES, INC., f/k/a GOODRICH REALTY AND DEVELOPMENT GROUP, INC., CARL H. TOTSCH, RICHARD M. COHEN, MORRIS WEISSMAN, MICHAEL MILLER AND STANLEY KREITMAN,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Do non-tendering shareholders who were damaged, but did not trade or rely upon material misstatements, omissions and market manipulation by the offeror, have a cause of action under Section 14(e) of the Williams Act, 15 U.S.C. §78n(e).

TABLE OF CONTENTS

	Page
Question Presented.	ii
Opinions Below	2
Jurisdiction	2
Statute Involved.	3
Statement of the Case	4
Reasons for Granting the Writ. . .	16
Conclusion	32

TABLE OF AUTHORITIES

CASES:

Aaron v. Securities Exchange Commission, --U.S.--, 100 S.Ct. 1945 (1980) 32

Affiliated Ute Citizens v. United States, 406 U.S. 128 reh. denied, 407 U.S. 916, reh. denied, 408 U.S. 931 (1972) 24,25

Bishop v. Wood, 426 U.S. 341 (1976) 5

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 reh. denied, 423 U.S. 884 (1975) . . 24

Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, (2d Cir. 1969). . 28

Ernst & Ernst v. Hochfelder, 425 U.S. 185, reh. denied, 425 U.S. 986 (1976) 33

Harris v. American Investment Co., 523 F.2d 220 (8th Cir. 1975), cert. denied, 423 U.S. 1054 (1976) 13,19
Hurwitz v. R. B. Jones, 76 F.R.D. 149 (W.D. Mo. 1977) 29
In re Commonwealth Oil-Tesoro Petroleum Corp. Secur. Litigation 467 F.Supp. 227 (W.D. Tex. 1979) 28
Iroquois Industries, Inc. v. Syracuse China Corp., 417 F.2d 963 (2d Cir. 1969), cert. denied, 399 U.S. 909 (1970) 28
Jones v. Alfred H. Mayer Co., 392 U.S. 409, (1968). 16
Lewis v. McGraw, 619 F.2d 192 (2d Cir. 1980) 29,30
McCloskey v. Epko Shoes, Inc., 391 F.Supp. 1279 (E.D. Pa. 1975) 28,29
Nye v. Blythe Eastman Dillon & Co., 588 F.2d 1189 (8th Cir. 1978) . 13,19
Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, reh. denied, 430 U.S. 976, reh. denied sub nom First Boston Corp. v. Chris-Craft Industries, Inc., 430 U.S. 976, reh. denied sub nom Bangor Punta Corp. v. Chris-Craft Industries, Inc., 430 U.S. 976 (1977) 30,31
Shapiro v. Midwest Rubber Reclaiming Company, 470 F.Supp. 173 (E.D. Mo. 1979) 12
Shapiro v. Midwest Rubber Reclaiming Company, 626 F.2d 63 (8th Cir. 1980) 14,15
Smallwood v. Pearl Brewing Company, 489 F.2d 579 (5th Cir), cert. denied, 419 U.S. 873 (1974) . .26,27,28, 30

Stull v. Bayard, 561 F.2d 429
(2d Cir. 1977), cert. denied,
434 U.S. 1035 (1978) . . .27,28,29,30
T.S.C. Industries, Inc. v. Northway,
Inc., 426 U.S. 438 (1977) . . .24,25

STATUTES

15 U.S.C. §78n(e). . . . . .passim

MISCELLANEOUS

Congressional Record

113 Cong. Rec. 24666 (1976) . . .23
113 Cong. Rec. 24662 (1976) . . .22

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Alvin J. Shapiro, et al., on behalf of themselves and all others similarly situated, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on July 25, 1980 which affirmed the District Court's grant of summary judgment against plaintiffs in this securities fraud case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was rendered on July 25, 1980, and is reported at 626 F.2d 63 (8th Cir. 1980). (Set forth as Appendix A hereto). Petitioners' timely petition for rehearing or rehearing en banc was denied without opinion by the Eighth Circuit on August 19, 1980 (Appendix B hereto).

The opinion of the United States District Court for the Eastern District of Missouri was rendered on May 2, 1979, and is reported at 470 F.Supp. 173 (E.D. Mo. 1979). (Appendix C hereto).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 25, 1980. Petitioners' timely

petition for rehearing or rehearing en banc was filed on August 8, 1980 and denied on August 19, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTE INVOLVED

Section 14(e) of the Williams Act, 15 U.S.C. §78n(e), provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Eighth Circuit holding that under Section 14(e) of the Williams Act, non-tendering shareholders who are actually damaged by deception and market manipulations in connection with a tender offer, suffer no damage as a matter of law and therefore have no cause of action unless they can also prove that they traded or somehow "relied" upon the deception and market manipulation. The District Court granted summary judgment to the defendants, and although the Eighth Circuit found that the bases for the District Court's ruling were in error, affirmed its decision on entirely different grounds. The posture of the case in this Court, however, remains the same as on the grant of a motion for summary judgment; all facts well pleaded

are presumed to be true where, as here, no contrary proof was ever adduced below. Bishop v. Wood, 426 U.S. 341, 347 (1976).

Factual Background

In March of 1975, the petitioners, Alvin J. and Jeanne K. Shapiro ("Shapiros" or "Petitioners") owned 500 shares of stock in defendant Midwest Rubber Reclaiming Company ("Midwest"), a Delaware corporation doing business principally in Illinois. In June of 1975, Petitioners filed this action on behalf of themselves and other shareholders similarly situated. They alleged that Midwest and the other defendants had violated, inter alia, Section 14(e) of the Williams Act, 15 U.S.C. §78n(e), in connection with an Exchange Offer made by Midwest for its own stock which began in March of 1975 and terminated a month prior to the filing of this action.

The Exchange Offer at issue was part of a scheme by Defendants to seize corporate control of Midwest. The scheme had its genesis in early 1974, when defendant Goodrich Realty and Development Group, Inc. (which later changed its name to Midcon, Inc.) ("Midcon"), a New York based real estate development company, purchased approximately a quarter-million shares of Midwest stock, mostly in private transactions at $15 per share. Midwest stock was then publicly trading on the American Exchange for between $7.375 and $13.75 a share. The principal private sellers were Ernest Larch and Basil Georges, then Midwest directors, and a company owned partly by J. Baxter Brinkman, another Midwest director. These stock purchases gave Midcon over 51 percent of Midwest's voting shares.

After selling their Midwest stock, directors Larch, Georges and

Brinkman resigned from the board, as did director Spencer Murcheson. At the April, 1974, Midwest Board of Directors meeting, two of these four vacancies were filled by the election of defendants Richard Cohen (Chairman of the Board at Midcon) and Morris Weissman (Midcon Vice-President and Secretary). In November of 1974, the Board amended the Midwest by-laws to reduce the number of directors from nine to seven, the majority of whom were now aligned with the new control figure, Midcon.

The Challenged Proxy Statement and Exchange Offer

In September of 1974, the Midcon-dominated Midwest board decided to increase Midcon's ownership of Midwest's stock from 51 per cent to more than 80 percent. To achieve 80 percent ownership for Midcon, the Midwest board approved the challenged plan to acquire at least 80 percent (and up to all) of the outstanding Midwest common

stock through an offer to Midwest's shareholders to exchange their stock for a $12 principal amount subordinated debenture bearing 12 percent annual interest.[1]

On March 20, 1975, the Exchange Offer commenced and after one extension, terminated on May 30, 1975. The offering circular sent to Midwest's shareholders as the basis for the Exchange Offer was challenged by the Shapiros in their complaint under Williams Act Section 14(e) as being false and misleading in several respects,

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1. Throughout this case, Petitioners have alleged, and not only does no contrary proof exist, but these facts are presumed to be true, that the $12 debenture was worth only $7 to $9, the value ascribed to it in an appraisal by Midwest's own investment bankers made shortly after the Petitioners and others complained to the SEC or filed suits. This was far below the $15 per share price paid to Midwest's former directors for their stock and below the value of the Midwest stock at the relevant time measured either by net current asset value ($13.14) or book value ($23.29) per share.

primarily by falsely stating that shareholder participation was "completely voluntary" when in fact Defendants forced the shareholders to make the non-choice of either accepting $12 debentures of lesser value than their stock or retaining their stock in a delisted company saddled with huge debts, no longer subject to SEC disclosure requirements, without dividend prospects and which could be merged at any time into Midcon.[2] Petitioners did not tender their stock in response to the Exchange Offer; however, 127,000 shares

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2. Petitioners further alleged, and again on the granting of a motion for summary judgment, these facts are presumed to be true, that the Exchange Offer was deceptive for failing to obtain an independent appraisal of the fairness of the offer, failing to disclose the $12 debenture was not worth $12 and would trade at a discount (which it did), failing to disclose Midcon's intention to make a cash tender offer if the Exchange Offer resulted in its holding less than 80 percent of Midwest's common stock, failing to state a legitimate business purpose for the Exchange Offer and misstating Midcon's intention to not merge with Midwest despite contrary representations in Midcon's Schedule 13D filed with the S.E.C.

were tendered, increasing Midcon's ownership of Midwest to 73 percent.

Unchallenged Post-Fraud Occurrences

In December of 1975, Midwest continued in its efforts to increase Midcon's percentage ownership to more than 80 per cent by making a cash tender offer to its shareholders at $9 per share. This was accepted by a sufficient number of shareholders to boost Midcon's ownership of Midwest to 82 percent. Again, Petitioners did not tender.

The final step was taken and Midwest ceased to exist as a publicly held company when in March of 1978 the Midwest Board approved a freeze-out merger of Midwest into Newco, Inc., a Midcon subsidiary, by an involuntary exchange of all remaining outstanding Midwest common stock for $45 principal amount subordinated

debentures with 10 percent annual interest.[3] This freeze-out was approved at the March 15, 1978, Midwest shareholders' meeting and thereafter accomplished. Neither the 1978 freeze-out merger nor the earlier December, 1975, cash tender offer is challenged in this lawsuit. Indeed, Petitioners exchanged some of their Midwest stock for the $45 debentures tendered to them in the 1978 merger.

DISTRICT COURT PROCEEDINGS

The District Court initially certified a plaintiff class of all persons who were Midwest shareholders as of March 20, 1975 (the effective date of the challenged Exchange Offer) who did not sell or exchange their stock during the March 20 Exchange Offer. The class was later narrowed to exclude shareholders who exchanged

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3. The $45 debenture has been valued at approximately $40, which Petitioners do not contest.

shares pursuant to the December, 1975, cash tender offer.

In February of 1979, the Defendants jointly moved for dismissal or summary judgment, arguing, inter alia, that the March, 1978, merger mooted the Shapiros' damage claims. The District Court granted the motion on May 2, 1979, Shapiro v. Midwest Rubber Reclaiming Co.,470 F. Supp. 173 (E.D. Mo. 1979), reasoning that because in the March 1978 freeze-out merger the Shapiros could receive a $45 debenture for each share, whose value exceeded the value the Petitioners claimed for their stock, they could not, as a matter of law, have been "damaged" by the fraudulent conduct of the defendants occurring three years earlier in the March 1975 Exchange Offer.

Proceedings In The Court Of Appeals

The Petitioners appealed the District Court's summary judgment ruling that Petitioners could prove "no damages,"

as well as its refusal to certify a shareholder class consisting of all Midwest shareholders as of March 20, 1975 (instead of only those who did not tender in response to the March 20, 1975, Exchange Offer and the December, 1975, tender offer).

The Eighth Circuit agreed with the Petitioners that the District Court had plainly erred in holding that the 1978 freeze-out merger eliminated Petitioners' 1975 damages, reasoning that if culpable conduct exists, damages are measured at the time of either the misconduct or its reasonable discovery. The Eighth Circuit correctly applied the "second investment decision" rule developed in Harris v. American Investment Co., 523 F.2d 220 (8th Cir. 1975), cert. denied, 423 U.S. 1054 (1976) and Nye v. Blyth Eastman Dillon & Co., 588 F.2d 1189 (8th Cir. 1978), "that damages for securities fraud are fixed at the time that the fraud is committed or discovered,

and that after fraud events (such as a subsequent merger) are irrelevant." Shapiro v. Midwest Rubber Reclaiming Co., 626 F.2d 63, 69 (8th Cir. 1980); (Appendix A, at 20) However, instead of reversing the District Court because of its erroneous reliance upon after-fraud events, the Court of Appeals affirmed the District Court's judgment on entirely new and different grounds. The Eighth Circuit concluded that as a matter of law the Shapiros could have suffered no damage from the defendants' omissions, misstatements and market manipulation because the defendants' illegal conduct did not actually harm the plaintiffs

> either directly (through actual reliance) or indirectly (by affecting the market upon which the party traded.) [citation omitted] In this case, the Shapiros neither relied nor traded and so they were never harmed as a result. [footnote omitted]

Id. (Appendix A, at 21) "Because [petitioners] were never adversely affected by

the fraudulent conduct of which they complain ... in this case, the Shapiros neither relied nor traded ... they were never harmed as a result." Id.; (Appendix A, at 22)[4]

The question raised in this petition, whether a non-tendering shareholder has standing to bring an action under Section 14(e), was not briefed prior to the Eighth Circuit's decision because the controversy there focused on whether the subsequent, unrelated 1978 freeze-out merger could, as a matter of law, eliminate damages sustained by Petitioners in 1975.

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4. As a consequence of its "no damage" holding, the Eighth Circuit likewise affirmed the District Court's class certification order, stating that because the Petitioners suffered no injury themselves they could not properly represent any class, let alone one composed of tendering and non-tendering shareholders. Id., at 71; (Appendix A, at 32). Petitioners do not raise this issue in their petition because prevailing on the Section 14(e) question will necessarily require reconsideration of the class certification issue.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ are: (i) the issue of whether non-tendering shareholders have a cause of action under 15 U.S.C. 78n(e) raises an important, recurring question of federal securities law which has not been, but should be, settled by the Court and (ii) there is a conflict among the Courts of Appeals with respect to the issue of whether non-tendering shareholders may sue under 15 U.S.C. 78n(e).

1. THE EIGHTH CIRCUIT'S HOLDING UNDER 15 U.S.C. 78n(e) RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Petitioners recognize that simply showing that the Eighth Circuit's opinion is wrong does not satisfy the prerequisites of certiorari jurisdiction, which was conferred upon the Court "to decide issues, 'the settlement of which is of importance to the public as distinguished from...the parties.'" Jones v. Alfred H. Mayer Co.,

392 U.S. 409, 479 (1968) (Harlan, J., dissenting). However, the error in the Eighth Circuit's decision has caused a serious encroachment of important, federally protected rights. By fashioning a new rule which provides that although there is deception and manipulation in connection with a tender offer subject to Section 14(e) of the 1934 Act, non-tendering shareholders have no cause of action unless they "trade or rely," the Eighth Circuit has left a significant class of shareholders unprotected by the federal securities law.

Shareholder Damages Are Not Dependent Upon Reliance or Trading

Shareholders of a corporation such as Midwest, when faced with an exchange or tender offer for their shares, have only 3 choices: (1) they can tender their shares, (2) they can sell their shares or (3) they can hold their shares. Where, as here, the exchange offer, is deceptive and manipulates the market for

the shares, there is no justification for holding that shareholders who tender or trade have a cause of action whereas shareholders who refuse to tender or trade do not. Both are equally damaged.5

The damages sustained by the non-tenderers in this case arise from their inability to realize a fair value for their stock in March through May of 1975, which is unrelated to whether they tendered or relied in any manner on the fraudulent

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5. The capriciousness of the Eighth Circuit's distinction between traders and non-traders is manifest if applied to two hypothetical Midwest shareholders faced in March of 1975 with the same defective Exchange Offer: A who sells his shares in the market for $7 and immediately repurchases the same number of shares for the same $7 price and B, who faced with the same non-choice does not tender or sell his shares. A and B end up identically situated in every respect, except that under the Eighth Circuit's rule A would have a cause of action but B would not. The Eighth Circuit's holding denies relief to non-tendering shareholders simply because, in the face of a deceptive and manipulative exchange offer, then decide to hold rather than sell or tender their shares.

offering circular. At that time, they were forced to sell their shares to the offeror or on the market at a depressed price or to retain them at a depressed value. Under the admittedly controlling Harris-Nye rule of the time for damage calculation, the Petitioners' damages were fixed in March of 1975 as the difference between the $7 to $9 debenture value forced on them whether they tendered or not, and the true value of their shares at the time of the fraud or its reasonable discovery. At that time, tenderers held debentures worth less than their stock and non-tenderers held stock whose value had been manipulated to an artificially low level; both were equally damaged. As the Eighth Circuit recognized, the subsequent fortuitous escalation in the value of the Petitioners' stock is irrelevant.

Additionally, all non-tenderers were damaged by their demonstrable inability to pledge their depressed stock at true value as loan collateral or list it as such on financial statements for other credit availability purposes. The Petitioners have never been allowed to adduce any proof on this aspect of their manipulation-related damages, though they have always stood ready to do so.

Thus, the Eighth Circuit has summarily misapplied its own damage rules, denied petitioners the right to show damages unrelated even to its erroneous reliance rule and completely undermined the ability of non-tenderers to prove a cause of action under Section 14(e).[6]

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6. Indeed, the Eighth Circuit's requirement of reliance by non-tenderers is a contradiction in terms. In the usual case, reliers tender. Although it is conceivable that reliers could reject the inducement to tender, in the vast majority of cases this is not so. To deny protection to the vast majority of non-tenderers works a serious injustice and contravenes Congress' stated

(Footnote continued)

The Eighth Circuit's Holding Favors the Tender Offeror over the Offerees

Not only does the Eighth Circuit deny recovery to substantial shareholder classes, its rule undermines the careful congressional plan to protect all shareholders faced with a tender offer from deceptive or manipulative conduct. When the offeror deceives and manipulates the market for the subject shares,7 all shareholder-offerees are damaged irrespective of whether they tender, trade or hold. Deceptive information coupled with a manipulative scheme destroys the integrity of the securities markets which the Williams Act was designed to protect. Senator Williams, the Act's principal sponsor, made this goal clear:

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6. (continued)
intention to protect them from fraud and deception.
7. In this case, the artificial depression of the market price for Midwest's shares to the admitted $7-9 range resulting from the Exchange Offer for debentures with that limited value.

> Today, the public stockholder in deciding whether to reject or accept a tender offer possesses limited information. No matter what he does, he acts without adequate knowledge to enable him to decide rationally what is the best course of action. This is precisely the dilemma which our securities laws are designed to prevent. The competence and integrity of a company's management, and of the persons who seek management positions, are of vital importance to stockholders. Secrecy in this area is inconsistent with the expectations of investors and impairs public confidence in our Nation's securities markets....

113 Cong. Rec. 24662 (1976).

The Eighth Circuit's ruling improperly carves out from the protection of the Williams Act all those shareholders who, when faced with an unlawful exchange offer, decide not to tender their shares. As a result of this holding, target shareholders are forced to tender their shares (or sell them to others who may tender) in order not to be frozen out of a damage

recovery from a defective exchange or tender offer.

Such a result works an impermissible shift in the delicate balance Congress intended to maintain between offerors and target companies. Senator Williams stated:

> We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids. S. 510 is designed solely to require full and fair disclosure for the benefit of investors.

113 Cong. Rec. 24664 (1976).

The Eighth Circuit's ruling is thus inimical to both of the crucial policy considerations which underlie the Williams Act: first, to protect from deception and manipulation all shareholders -- not just some -- faced with an exchange or tender offer, and second, to maintain a fair balance between target and offeror. The ruling arbitrarily excludes large numbers of shareholders who choose not to tender

(or sell) their shares and tips the scales substantially in favor of offerors by requiring shareholders to tender if they desire to protect their rights to recover for damages.

The Eighth Circuit's Holding Introduces Unsolvable Proof Problems into 14(e) Actions

The mischief caused by the Eighth Circuit's ruling is nowhere more apparent than when analyzed in terms of its inflexible reliance requirement. To require subjective proof of reliance by non-tenderers presents the same unsolvable proof problems rejected by this Court in favor of objective tests of materiality and causation in TSC Industries Inc. v. Northway Inc., 426 U.S. 438, (1977) and Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972). A non-reliance rule, however, comports with the emphasis on objectivity stressed in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). There, the

Court ruled that under Section 10(b) a plaintiff must have purchased or sold a security during the relevant period because any other rule would allow potentially indefinite plaintiff classes of persons claiming they "would have" purchased or sold had the true facts been known. Under Section 14(e), the shareholder requirement appropriately limits the potential plaintiff class and no such indefinite class problems exist.

The decision of the Eighth Circuit introduces exactly the element of uncertainty resulting from mainly oral proof of subjective mental states which Blue Chip sought to avoid. Allowing non-tenderers to sue without respect to subjective reliance and on the basis of the objective tests of materiality and causation established by TSC Industries and Affiliated Ute assures properly delimited classes and obviates

subjective state-of-mind proof difficulties.

2. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS

In Smallwood v. Pearl Brewing Company, 489 F.2d 579 (5th Cir.), cert. denied, 419 U.S. 873 (1974), the Fifth Circuit ruled that a non-tendering shareholder who was frustrated in his attempt to tender his stock by missing the tender deadline could maintain an action under Section 14(e) and could do so even though he could not possibly have relied on the defendants' fraudulent misrepresentations. Focusing on the existence of an injury caused by fraudulent conduct, the court stated:

> ... under Section 14(e) a plaintiff may gain standing if he has been injured by fraudulent activities of others perpetrated in connection with a tender offer, whether or not he has tendered his shares.

489 F.2d at 596.[8] By ruling that

8. The court went on to affirm the district court's grant of summary judgment to the defendants finding that no illegal conduct had occurred.

non-tendering shareholders cannot sue (and that reliance must be proved), the Eighth Circuit contradicts the Fifth Circuit's Smallwood decision.

The Eighth Circuit's holding also runs counter to the Second Circuit's decision in Stull v. Bayard, 561 F.2d 429 (2d Cir. 1977), cert. denied, 434 U.S. 1035 (1978). There, the Second Circuit stated that a non-tendering shareholder could recover damages under 14(e) regardless of his decision not to tender, based on the fact that his non-tendered stock could be diminished in value due to misrepresentations made by the offeror. Likewise, here petitioners were damaged because their shares, whether tendered, sold, or held, were diminished in value by defendants' unlawful conduct. In Stull, plaintiffs' damages would be unrelated to reliance, (indeed, they would be based on a failure to rely), and the Second Circuit's recog-

nition in Stull of the non-tendering (and non-relying) shareholder's right to sue under Section 14(e) is in direct conflict with the pronouncement of the Eighth Circuit here.[9] Petitioners submit that had their appeal come before either the Fifth Circuit, or the Second Circuit panel which decided Stull, the result would clearly have been different; the district court would have been reversed and the case remanded for trial.[10]

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9. See also McCloskey v. Epko Shoes, Inc., 391 F.Supp. 1279, 1282 (E.D. Pa. 1975). (Earlier opinion from a Third Circuit jurisdiction expressly allowing a non-tendering shareholder to sue, and rejecting reliance as an element of damages under 14(e)).

10. Not only does the Eighth Circuit's opinion conflict directly with Smallwood and Stull, but it conflicts in principle with a host of lower court decisions stating that non-tenderers have an action under 14(e). E.g., Iroquois Industries, Inc. v. Syracuse China Corp., 417 F.2d 963, 969 (2d Cir. 1969), cert. denied, 399 U.S. 909 (1970); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 940-941 (2d Cir. 1969); In Re Commonwealth Oil/Tesoro Petroleum Corp. Secur. Litigation, 467 F.Supp. 227 (W. D. Tex.
(Footnote continued)

Not only is there an inter-circuit conflict requiring this Court's intervention, but there is a manifest need for a coherent policy pronouncement from this Court to resolve current dissonance in the lower courts. The discrepancy among the circuits over the role of reliance in 14(e) litigation has also led to confusion within the Second Circuit, itself, as reflected by the recent decision in Lewis v. McGraw, 619 F.2d 192 (2d Cir.), cert. pending, 49 U.S.L.W. 3066 (August 19, 1980). There, the court ignored its prior pronouncement in Stull and stated it is "indisputable" that reliance is "one element of a cause of

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10. (continued)
1979); McCloskey v. Epko Shoes, Inc., 391 F. Supp. 1279 (E.D.Pa. 1975); Hurwitz v. R. B. Jones, 76 F.R.D. 149, 161-163 (W.D.Mo. 1977). The conflict is evident by observing that the additional requirement of personal reliance by non-tenderers in effect reinstates the purchaser-seller rule because, in the usual case, the only way to prove reliance when there is deception is to accept the tender offer and sell or exchange stock.

action under 14(e)" 619 F.2d at 195. But the proposition considered so well settled by the Second Circuit in Lewis stands in conflict with the panels of the Second and Fifth Circuits which ruled to the contrary in Stull and Smallwood.

3. THE ISSUE AT BAR, EXPLICITLY LEFT OPEN BY THE COURT'S DECISION IN PIPER V. CHRIS-CRAFT INDUSTRIES, INC. IS RIPE FOR RESOLUTION.

This Court's landmark decision in Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977) held that a takeover bidder lacks standing to sue for damages under Section 14(e), but explicitly left open the issue presented here of non-tenderer standing. The Court stated:

> It may well be that [in 14(e)] Congress desired to protect... shareholder-offerees who decided not to tender their stock due to fraudulent misrepresentations by persons opposed to a takeover attempt. [citation omitted]. These shareholders, who might not enjoy the protection of 10(b) under [Blue Chip Stamps] could perhaps state a claim under

> 14(e), even though they did not tender their securities. 25 [emphasis added].

430 U.S. at 38-39. In note 25, the Court stated: "This case, of course, does not present that issue, and we express no view on it." 430 U.S. at 38. Indeed, the Court's Chris-Craft dictum left open not only the question of non-tenderer standing under 14(e), but defined precisely the more narrow sub-issue here: is proof of reliance an essential element of a cause of action under 14(e). This fact is evident in the Court's reference to those who may be protected by Section 14(e) as those "who decided not to tender their stock due to [e.g., in reliance on] fraudulent misrepresentations." The issue of non-tenderer standing having been left open in Chris-Craft, along with the reliance question, the time is ripe for resolution.

Present resolution of the conflict in the lower courts over the question

whether non-tendering shareholders may sue under Section 14(e) would comport with this Court's long-standing policy of building decisional securities law carefully, step-by-step, addressing for its holding only the narrow issue presented in important federal securities law cases, leaving for another day questions imminent but not squarely presented.[11] Litigation under Section 14(e) is increasing at a rapid rate and settlement by this Court of the issue presented here will give necessary guidance to the lower courts.

CONCLUSION

For the foregoing reasons, Petitioners pray that a writ of certiorari issue from this Court to the United States

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11. Most recently exemplifying this policy is the decision in Aaron v. S.E.C., ___ U.S. ___, 100 S.Ct. 1945 (1980) where the Court resolved in the defendant's favor the issue of whether scienter was required in an S.E.C. injunction action, which had been left unresolved by the Court's decision in
(Footnote continued)

Court of Appeals for the Eighth Circuit to review its judgment affirming the District Court's grant of summary judgment to the Defendants herein.

Respectfully submitted,

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October 13, 1980

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11. (continued)
Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1976).

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CERTIFICATE OF SERVICE

I, Lowell E. Sachnoff, counsel for Petitioners, hereby certify that on October 15, 1980, true and correct copies of the foregoing Petition for Writ of Certiorari were served on all parties required to be served by mailing copies to counsel for all parties as listed on the attached Service List via first class mail, postage fully prepaid.

Dated: October 15, 1980

LOWELL E. SACHNOFF

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. _____

Alvin J. Shapiro, and Jeanne K. Shapiro, as Joint Tenants on behalf of themselves and all others similarly situated and derivatively on behalf of Midwest Rubber Reclaiming Company,	)	
Appellants,	)	
v.	)	Appeal from the United States District Court for the Eastern District of Missouri
Midwest Rubber Reclaiming Company, Midcon Industries, Inc., f/k/a Goodrich Realty and Development Group, Inc., Carl H. Totsch, Richard M. Cohen, Morris Weissman, Michael Miller and Stanley Kreitman,	)	
Appellees.	)	

Submitted: December 4, 1979

Filed: July 25, 1980

Before HEANEY, BRIGHT, AND ROSS, Circuit Judges.

BRIGHT, Circuit Judge.

Alvin J. Shapiro and Jeanne K. Shapiro, former shareholders of Midwest Rubber Reclaiming Company (Midwest), brought this action against Midwest, Midcon Industries, Inc. (Midcon), and certain of their officers and directors, alleging numerous violations of the federal securities statutes and state and common law. Having already dismissed several of these claims, the district court[1] granted summary judgment as to the remainder on May 2, 1979, holding that the Shapiros had suffered no damages as a result of the defendants' alleged unlawful activities. Shapiro v. Midwest Rubber Reclaiming Co., 470 F. Supp. 173 (E.D. Mo. 1979). The Shapiros now appeal from this judgment and the district court's partial denial of

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1. The Honorable James H. Meredith, United States Senior District Judge for the Eastern District of Missouri.

their requested class certification. For the reasons set forth below, we affirm.

I. Background.

Midwest is a Delaware corporation with its principal place of business in East St. Louis, Illinois. The Shapiros became Midwest shareholders in 1973, when Midwest stock was listed and traded on the American Stock Exchange. In January and February of that year, Alvin Shapiro purchased 500 shares of Midwest common stock at an average price of $12.656 per share. In December of 1973, the Shapiros jointly purchased 300 more shares of Midwest common stock at an average purchase price of $9.387 per share.

In April of 1974, Midcon, then known as Goodrich Realty and Development Group, Inc., began acquiring Midwest common stock. Between April 9 and September 30,

1974, Midcon acquired 226,076 shares or 51.72 percent of the outstanding common stock of Midwest. Midcon purchased 220,776 of these shares in private transactions for $15 per share. It acquired the remaining 5,300 shares in the open market, at prices ranging from $12.125 to $13 per share.

Of the shares that Midcon acquired in private transactions, 49,393 were purchased from two Midwest directors, Basil Georges and Ernest Lorch.[2] Another 22,900 shares were purchased from Computer Graphics, Inc., a company in which another Midwest director, J. Baxter Brinkman, had a 25 percent stock ownership interest.[3] Georges and Brinkman resigned as directors shortly after selling their stock;

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2. Basil Georges was originally joined as a defendant in this action, but on October 3, 1977, the Shapiros voluntarily dismissed their claims against him. Ernest Lorch has never been named as a defendant.
3. The Shapiros originally named J. Baxter Brinkman as a defendant, but he has since been dismissed.

Lorch waited some two months to resign. Midcon paid a premium for these shares of $1.25 to $2.75 over the then-prevailing market price. Midcon also paid a premium on other privately purchased shares, ranging from $1.25 to $7.625 per share over the market price.

At the April 16, 1974, meeting of the Midwest Board of Directors, appellees Richard Cohen and Morris Weissman were elected to fill the vacancies created by the resignations of Mr. Brinkman and Mr. Georges. On June 3, 1974, appellee Michael Miller was elected by the board to serve as a director for the unexpired term of Spencer Murchison, who had resigned. On November 25, 1974, the Midwest Board of Directors unanimously approved an amendment to the corporate bylaws which reduced from nine to seven the number of directors of Midwest.

In September of 1974, the Midwest Board of Directors approved a plan to offer Midwest's minority shareholders the opportunity to exchange their common stock for a $12 principal amount subordinated debenture bearing interest at the rate of 12 percent per year. The purpose of this exchange offer was to increase Midcon's proportionate ownership of Midwest common stock to 80 percent or more, thus enabling Midcon and Midwest to file consolidated federal income tax returns.

On February 7, 1975, Midwest mailed a proxy statement to all of its common shareholders announcing the annual meeting scheduled for February 24, 1975. The proxy statement disclosed how Midcon had gained control of Midwest and the details of the proposed exchange offer. The Shapiros allege, however, that the proxy statement was false and misleading, in violation of section 14(a) of the

Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. 78n(a)(1976), in that it failed to disclose that (a) Midcon had consented to Midwest's entering into employment contracts with its officers on May 1, 1974; and (b) the object of the exchange offer was to permit Midcon to take advantage of certain tax benefits. At the February 24, 1975, Midwest shareholder meeting, four of Midcon's nominees were elected to the seven-man board of directors, giving Midcon formal control of that board.

On March 20, 1975, Midwest mailed to its shareholders an offering circular describing the subordinated debenture exchange offer. The subordinated debentures offered to the minority shareholders were later appraised to have had a fair market value as of the date of the exchange offer of $9.24 apiece. The closing price of Midwest's common stock on the American Stock

Exchange on May 19, 1975, however, was $7.375 per share.[4]

The Shapiros allege that the offering circular sent to Midwest shareholders on March 20, 1975, contained untrue statements and omissions of material facts.[5] More specifically, they allege that the circular falsely stated that participation

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4. The Shapiros contend that the true value of the debentures is reflected in the market price for Midwest common stock at the time the exchange offer was outstanding. Appellees respond that the contingent nature of the exchange offer destroys any assumption of equivalent value. Appellees suggest further that the difference in value between the debentures and Midwest common stock reflects a premium roughly equivalent to that received by the former Midwest directors who sold out privately to Midcon.

5. These misstatements and omissions, it is alleged, violated 14(e) of the 1934 Act (as amended), 15 U.S.C. 78n(e)(1976). In addition, the Shapiros have asserted as a derivative claim that the offering circular violated the antifraud provisions of the securities laws, i.e., 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a)(1976), 10(b) of the 1934 Act, 15 U.S.C. 78j(b), and the rules promulgated thereunder.

in the exchange offer was "completely voluntary," when the alternative was to retain holdings in a delisted and subservient corporation. They allege in addition that the circular failed to obtain an opinion of counsel or an independent appraisal as to the fairness of the transaction. Nor did it disclose that the debentures were to be traded at a substantial discount. Finally, the circular failed to set forth a legitimate business purpose and failed to disclose Midcon's commitment to pursue a subsequent cash tender offer if it did not receive at least 80 percent of Midwest's common stock. The appellees argue that, to the contrary, the offering circular disclosed all of the relevant information about the exchange offer.

This exchange offer, after one extension, terminated on May 30, 1975. Approximately 127,000 shares of Midwest common stock were exchanged during this

period, increasing Midcon's ownership interest in Midwest's common stock to approximately 73 percent. The Shapiros did not tender their shares pursuant to this exchange offer.[6]

On November 13, 1975, in an effort to increase Midcon's ownership interest to the 80 percent required for filing consolidated federal income tax returns, the Midwest Board of Directors approved a cash tender offer whereby Midwest would offer to repurchase 30,000 shares of its outstanding common stock at $9.25 per share. Midwest made its tender offer in December 1975, and approximately

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6. Because the Shapiros were neither buyers nor sellers, the district court on August 31, 1976, dismissed their individual and class claims alleging violations of 17(a) of the Securities Act of 1933 and 10(b) of the 1934 Act. See Greater Iowa Corp. v. McLendon, 378 F.2d 783, 789 (8th Cir. 1967); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). Although the Shapiros noted this order for appeal, they do not challenge it in their brief. Accordingly, we consider the issue abandoned on appeal.

36,000 shares were tendered in response. As a result of this tender, Midcon's proportionate ownership of outstanding Midwest common stock rose to approximately 82 percent. The Shapiros did not participate in the cash tender offer, and they do not challenge it here.

In fiscal 1976 and 1977, Midcon and Midwest filed consolidated federal income tax returns, which resulted in tax savings to both firms. In late 1977, the Midwest Board of Directors approved a merger between Midwest and Newco, Inc., a wholly owned subsidiary of Midcon. The proposed merger called for the surrender of all outstanding Midwest common stock in exchange for a $45 principal amount subordinated debenture, bearing interest at the rate of 10 percent and due in 1998. On February 20, 1978, Midwest mailed to all of its outstanding common shareholders a proxy statement together with a cover letter set-

ting forth the terms of the proposed merger and announcing that the proposal would be voted upon at the annual shareholders' meeting. The proxy statement noted that the $45 subordinated debentures to be exchanged in the proposed merger had been appraised at approximately $40 apiece. The merger was approved at the shareholders' meeting on March 15, 1978, and the Shapiros thereafter exchanged or became entitled to exchange their common stock for the subordinated debentures. The Shapiros have not challenged this merger. Having invested $9,144.10 in Midwest common stock in 1973, they now hold debentures with a face value of $36,000.

The Shapiros filed this action on June 24, 1975, in the Northern District of Illinois. Their complaint charged the appellees with having violated the law by devising a stock exchange scheme to appropriate the assets of Midwest, causing economic detriment to Midwest's minority

shareholders. On October 17, 1975, the action was transferred to the Eastern District of Missouri. The Shapiros thereafter twice amended their complaint in response to district court rulings. The first amended complaint asserted a number of claims derivatively on behalf of Midwest,[7] and the second omitted pendent state law claims.[8] The Shapiros' second amended complaint requested several forms of relief, but according to their appellate brief, the Shapiros principally seek monetary damages equal to the difference between the $15 per share paid privately by Midcon and $7.375, the market price for

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7. The district court interpreted the Shapiro's initial complaint as alleging derivatively only state and common law violations of fiduciary duty. In their first amended complaint, the Shapiros added derivative allegations that the appellees' conduct violated both the antifraud provisions of the federal securities laws, see note 5 supra, and 13(d) of the 1934 Act, 15 U.S.C. 78m (d)(1976), which required Midcon to file certain information with the SEC when it purchased Midwest stock.

8. In an order dated September 27, 1977,
(Footnote continued)

Midwest stock at the time of the exchange offer.

On June 8, 1978, the district court partially granted the Shapiros' motion for class certification. The district court certified a class to consist of all persons who owned shares of Midwest common stock on March 20, 1975, and who did not sell or exchange their stock during the period that the March 20, 1975, exchange offer was outstanding. The district court later amended its order to exclude also those shareholders who did not sell their

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8. (continued)
the district court declined to exercise pendent jurisdiction in this case, and accordingly it dismissed the Shapiros' state law claims without prejudice. On October 18, 1977, the Shapiros filed their second amended complaint, alleging violations solely of the federal securities laws. At the same time, the Shapiros filed suit in the Circuit Court for the City of St. Louis, asserting class and derivative claims against the appellees for alleged violations of state and common law duties.

stock pursuant to the December 8, 1975, cash tender offer. On February 1, 1979, the appellees filed a joint motion for summary judgment, arguing, among other things, that by virtue of the March 15, 1978, merger, the Shapiros suffered no damages due to the alleged unlawful activities of Midcon and the other appellees in 1975. The district court granted this motion on May 2, 1979.

In its memorandum opinion, the district court reasoned that the Shapiros were, in the end, sellers of securities, whose damages were to be measured by the difference between the fair market value of their shares when sold and the amount actually received. Shapiro v. Midwest Rubber Reclaiming Co., supra, 470 F. Supp. at 178. Because the Shapiros were to receive a subordinated debenture worth $40 for each share of their stock, while they claimed that their shares were "worth" only $15, the court held that they could estab-

lish no damages. The court distinguished Harris v. American Investment Co., 523 F.2d 220 (8th Cir. 1975), cert. denied, 423 U.S. 1054 (1976), as applicable only to buyers of securities. The court also dismissed the Shapiros' derivative claims because, it found, "no damages can be shown to the corporation." Shapiro v. Midwest Rubber Reclaiming Co., supra, 470 F. Supp. at 179. The Shapiros do not challenge this finding on appeal.[9] Thus, only the individual and class action claims remain for our consideration.

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9. To be sure, in their reply brief the Shapiros suggest that their arguments regarding damages apply to the district court's dismissal of their derivative as well as their class action allegations. The district court made separate findings with respect to these claims, however, and the Shapiros' arguments are restricted to the proper measure of damages for holders of securities. The Shapiros do not suggest that the district court's finding of no harm to Midwest was clearly erroneous, and indeed the record before us would not support such an argument.

II. Analysis.

A. The Issue of Damages.

The Shapiros argue strenuously that the district court mischaracterized them as "sellers" and that, in any event, the rule in Harris v. American Investment Co., supra, applies to buyers and sellers alike. We agree that, in an appropriate case, a defrauded seller may claim damages under the Harris doctrine. Nonetheless, we hold in this case that Harris is not relevant to the Shapiros' asserted damages.

In Harris, supra, the plaintiff had purchased shares in a corporation at a time when, he alleged, the filing of false and misleading information had artificially inflated the market price. The district court found that Harris had suffered no damages, because he could have recovered his investment by selling either just after

he had made his investment, or after filing his lawsuit. This court reversed, holding that Harris could show damages either by proving that the actual value of his securities on the date of purchase was less than what he paid for them, or by comparing the latter sum with the market value of the securities after the fraud was publicly discovered. Harris v. American Investment Co., supra, 523 F.2d at 227. This court also held that a defrauded buyer of securities may maintain an action for damages, even though he continues to hold the securities. The court noted that such a buyer has, in effect, made a second investment decision at the time he discovers the fraud, one unrelated to his initial decision to purchase the stock. Damages for fraud in the initial transaction are not affected by events after this second decision. Id. at 228.

These damage rules are equally applicable to a defrauded seller. Such a person may prove his damages by the difference between the fair market value of his securities when sold and the amount actually received, as noted in Ehrler v. Kellwood Co., 391 F. Supp. 927, 930 (E.D. Mo.), aff'd on other grounds, 521 F.2d 1347 (8th Cir. 1975). If the "fair" market value of the securities when sold is unascertainable because of the widespread impact of false and misleading information, then the seller may employ either of the methods of proof outlined in Harris to establish his damages.

This court has specifically applied the "second investment decision" rule of Harris to the damage claims of plaintiffs who were both buyers and sellers. In Nye v. Blyth Eastman Dillon & Co., Inc., 588 F.2d 1189 (8th Cir. 1978), the plaintiffs proved that their broker had

made unauthorized purchases and sales of securities. In a number of instances, however, the plaintiffs had in effect ratified the broker's actions. This court held that the plaintiffs' damages did not extend beyond the period in which they relied on the broker's misrepresentations, plus a reasonable time thereafter that would allow them to take corrective action by selling or repurchasing the securities in question. Id. at 1198-1200.

The Shapiros derive from these cases the rule that damages for securities fraud are fixed at the time that the fraud is committed or discovered, and that after-fraud events (such as a subsequent merger) are irrelevant. This is true enough in a securities fraud case, but such is not really the nature of the Shapiros' claim.

The rule in Harris and its progeny is based upon the proposition that

damages for securities fraud are determined in accordance with the extent to which false and misleading information actually harmed the complaining party, either directly (through actual reliance) or indirectly (by affecting the market upon which the party traded). See Vervaecke v. Chiles, Heider & Co., Inc., 578 F.2d 713, 715-16 (8th Cir. 1978). In this case, the Shapiros neither relied nor traded, and so they were never harmed as a result.[10] They cannot claim the benefit of the "second

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10. The Shapiros allege, however, that false and misleading information in the proxy statement and exchange offer prompted some minority shareholders to sell their stock for less than it was worth. Although these shareholders may well have a claim for damages, the Shapiros and others in their class (as certified) did not act in reliance upon this information and cannot be said to have been harmed by it. It is for this very reason that the district court dismissed their individual and class action antifraud claims. See note 6 supra. Indeed, if we assume the accuracy of the Shapiros' charges, both Midwest and those of its shareholders who did not participate in the exchange offer but who sold out later may have been financially advantaged by the appellees' fraudulent conduct.

investment decision" rule because they made no initial investment decision upon which liability or damages can be predicated. Because they were never adversely affected by the fraudulent conduct of which they complain, the Shapiros cannot claim the rule in Harris as a basis for showing damages to themselves or other members of their class.

This conclusion does not end our inquiry, of course. We must examine the pleadings in this case to determine if there is some other theory under which the Shapiros might recover damages. That is to say, we must examine the grounds asserted for individual and class relief: alleged violations of the proxy and tender offer provisions of the 1934 Act, 15 U.S.C. 78n(a) and (e)(1976).11

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11. We note in passing that there may be some question whether the Shapiros have standing to advance their claim under 15 U.S.C. 78n(e)(1976). Cf. Hundahl v. United

(Footnote continued)

The Shapiros allege that material omissions as well as false and misleading information infected the 1975 proxy statement and exchange offer, both of which contributed materially to Midcon's takeover of Midwest.[12] The Shapiros no longer claim that this takeover harmed Midwest; rather, they argue simply that they should receive the same price per share for their stock as was paid privately to other Midwest shareholders. In other words, they claim damages premised on some notion of fairness. Cf. Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 66 (1978)

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11. (continued)
Benefit Life Ins. Co., 465 F. Supp. 1349, 1369 (N.D. Tex. 1979) (denying standing to plaintiffs who clearly did not rely on alleged misrepresentations in the tender offer materials). Nonetheless, the district court did not consider this issue and it is not before us on appeal.

12. For present purposes we assume, as we must, the truthfulness of these allegations. The allegations suggest that the Shapiros may have suffered harm despite their own inaction because the appellees unlawfully induced other minority shareholders to exchange their shares.

(prayer for relief may be examined to illuminate the substantive theory under which a plaintiff is proceeding).[13]

Undoubtedly, a takeover such as this (assuming that the eventual merger was planned from the outset) raises basic fairness problems in the division of the purchase price among former shareholders. See Brudney and Chirelstein, Fair Shares in Corporate Mergers and Takeovers, 88 Harv. L. Rev. 297, 330-36 (1974); Brudney and Chirelstein, A Restatement of Corporate Freezeouts, 87 Yale L.J. 1354, 1361-62 (1978).[14] Moreover, while fairness claims per se are not cognizable under the federal

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13. The Shapiros' complaint also contains suggestions that former Midwest directors acted faithlessly in selling their shares privately to Midcon. Although in some circumstances premiums paid to controlling stockholders can be recovered, see Perlman v. Feldmann, 219 F.2d 173 (2d Cir.), cert. denied, 349 U.S. 952 (1955), these circumstances are not present here and, in any event, the selling directors are no longer parties defendant in this case.

14. Brudney and Chirelstein analogize the two-step takeover (tender offer or private

(Footnote continued)

securities laws, see Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977), a court may inquire into the fairness of the terms of a transaction or a change in corporate structure to determine the appropriate relief for procedural irregularities, such as proxy violations. See Mills v. Electric

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14. (continued)
purchase, followed by merger) to a unitary sale of the firm's assets. Where the firm itself is sold, all stockholders share pro rata in the proceeds; Brudney and Chirelstein argue that the same rule of pro rata distribution should be applied where that result is achieved in successive transactions. That is to say, they would prohibit an acquiring firm from making differential payments to the shareholders of the acquired firm. Brudney and Chirelstein also suggest, however, that payment of a premium for control is less objectionable if the acquiring firm proposes to operate the acquired firm for a substantial period as a partly owned subsidiary, for then it is reasonably likely that the minority shareholders will benefit from the new management. Brudney and Chirelstein, supra, 88 Harv. L. Rev. at 332 n.70. (But see note 13 supra.) In such a case the parent firm assumes a fiduciary duty with respect to these shareholders. See note 15 infra.

Auto-Lite Co., 396 U.S. 375 (1970).15

If we assume that the conditions for such an inquiry are met in this case, however, we must focus on the fairness of the entire takeover procedure. Clearly the Shapiros were harmed, if at all, only when the takeover was consummated -- i.e., when they were frozen out in 1978. They do not,

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15. In Mills, minority Auto-Lite shareholders challenged the 1963 merger of Auto-Lite and Mergenthaler Linotype Co. on the ground that the Auto-Lite management had failed to disclose material information in the proxy statement soliciting approval for the merger. The Supreme Court held that the shareholders had established a sufficient causal relationship between the omissions in the proxy material and the merger to justify relief. Id. at 384- 85. The Court indicated that the fairness of the terms of the merger would be a relevant consideration in determining the appropriate relief. See id. at 386-89.

On remand, the Seventh Circuit held that the terms of the merger had been fair to the minority shareholders; accordingly, the court denied them any damages. Mills v. Electric Auto-Lite Co., 552 F.2d 1239 (7th Cir.), cert. denied, 434 U.S. 922 (1977). The court relied upon Brudney and Chirelstein, supra, 88 Harv. L. Rev. at 307-25, in analyzing the fairness requirements of the fiduciary duty which a parent corporation owes to minority shareholders of its long-held subsidiary.

however, challenge the terms of the freeze-out merger or allege that they were harmed by it.[16] Consequently, they cannot show damages due to alleged unfairness.

We conclude that summary judgment in this case was appropriate, because the Shapiros' allegations provide no basis on any legal theory for granting relief to them or the other members of their class, as certified. The Shapiros have simply failed to establish through their pleadings that they were personally harmed by the acts of which they complain. Cf. 15 U.S.C. 78bb(a)(1976) (limiting a person's recovery under the 1934 Act to "his actual damages

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16. The fact that the Shapiros eventually received a $45 debenture for each share of their Midwest stock suggests the reasonable inference that they can advance no personal claims of unfair treatment in the takeover process. Those members of the Shapiros' class who sold out before the final merger can likewise claim unfairness only with respect to the prices at which they sold. No such claim is made here.

on account of the act complained of"). We turn now to consider whether the district court correctly excluded from the plaintiff class those Midwest shareholders who earlier exchanged or tendered their shares.

B. The Class Certification Claim.

The Shapiros argue that, regardless of the merits of their individual and class claims, the district court erred in refusing to certify a class of all persons (except the appellees and their families) who owned Midwest common stock on March 20, 1975.[17] The proposed class would have included all those who exchanged their shares for subordinated debentures

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17. [T]he denial of class certification [is] an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment. [Deposit Guaranty National Bank v. Roper, 100 S.Ct. 1166, 1172 (1980)(footnote omitted).]

pursuant to the March 20, 1975, exchange offer, or participated in the subsequent cash tender offer.

Initially, we note that a trial court has broad discretion in determining whether a class action may be maintained, and its determination will not be overturned absent a showing that it abused that discretion. Wright v. Stone Container Corp., 524 F.2d 1058, 1061 (8th Cir. 1975); Polin v. Conductron Corp., 552 F.2d 797, 802 (8th Cir.), cert. denied, 434 U.S. 857 (1977); Rule v. Intern. Ass'n of Bridge, Etc., Workers, 568 F.2d 558, 563 (8th Cir. 1977). This discretion extends to defining the scope of the class. After reviewing the record in this case, we are unpersuaded that the court abused its discretion in refusing to certify the class requested by the Shapiros.

Fed. R. Civ. P. 23(a) sets forth four prerequisites to a class action: 1) numerosity of the class, 2) common questions of law or fact,3) typicality of the repsentatives' claims or defenses, and 4) adequacy of representation. The district court found that, while the Shapiros' proposed class satisfied the requirements of numerosity and common questions, the fact that the Shapiros had not exchanged their stock in response to the allegedly unlawful exchange offer rendered their claims atypical and their representation suspect. The district court relied upon the following language in 3B Moore's Federal Practice 23.07[3]:

> In order for a party adequately to represent a class or a subclass, his interests must be wholly compatible with and not antagonistic to those whom he would represent. (Footnote omitted.)

Accordingly, the court restricted the plaintiff class to those Midwest share-

holders who did not exchange their shares in response to the 1975 exchange offer, later amended to exclude also those who did not participate in the later cash tender offer.[18]

As we held above, the Shapiros have failed to establish that they were harmed by any of the acts of which they complain. In East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977), the Supreme Court held that "a class representative must be part of the class and 'possess the same interests and suffer the same injury' as the class members." Id. at 403 (citations omitted). In that case, as here the named plaintiffs "could have suffered no injury as a result of the alleged [un-

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18. The district court offered no explanation for this latter restriction, which turns on an event unchallenged by any party. Although we do not understand how the concerns that underlay the court's initial order required its subsequent amendment, our disposition of the certification issue renders this action of no consequence.

lawful] practices, and they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury." Id. at 403-04. It follows that the district court acted properly in refusing to certify the Shapiros as representatives of a class including participants in the 1975 exchange offer.[19]

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19. Like the Court in Rodriguez, we decide this issue upon the record before us. See id. at 406 n.12. We do not, however, rely simply on the Shapiros' eventual receipt of $45 subordinated debentures in return for their stock, for it seems to us a necessary implication of Deposit Guaranty National Bank v. Roper, supra, and U.S. Parole Comm'n v. Geraghty, 100 S.Ct. 1202 (1980), that the issue of proper class certification survives and must be considered apart from receipt of relief by named plaintiffs. Rather, we have examined the Shapiros' allegations to determine the nature of their interest throughout this litigation in the conduct and transactions they challenge. These allegations disclose no harm to the Shapiros either at the time that they brought this action or thereafter.

Because we find Rodriguez dispositive of the issue before us, we need not consider the parties' other arguments regarding the typicality of the Shapiros' claims and the adequacy of their proposed representation.

Accordingly, we affirm.

A true copy.

Attest:

Clerk, U.S. Court of Appeals
Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1424

September Term, 1979

Alvin J. Shapiro, et al.,	)	
Appellants,	)	Appeal from the United States
vs.	)	District Court for the Eastern District
Midwest Rubber Reclaiming Company, et al.,	)	of Missouri
Appellees.	)	

The Court having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

August 19, 1980

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ALVIN J. SHAPIRO, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Cause No. 75-932C
	)	
MIDWEST RUBBER RECLAIMING COMPANY, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM

This matter is before the Court on the motion of defendants Midwest Rubber Reclaiming Company (Midwest), Midcon Industries, Inc. f/k/a Goodrich Realty and Development Group, Inc. (Midcon), Carl H. Totsch, Richard M. Cohen, Morris Weissman, Michael Miller and Stanley Kreitman, for summary judgment in their favor against plaintiffs and the class they represent in Count I and against plaintiffs in their

derivative suit in Count II. For the reasons stated below, defendants' motion will be granted.

Plaintiffs, residents of Cook County, Illinois, originally brought this action in the Northern District of Illinois on June 24, 1975, both directly and derivatively, on behalf of themselves and all others similarly situated, to enforce rights created by the federal securities laws and also various pendent and diversity claims arising under state law. The federal securities laws relied on include Section 17(a) of the Securities Act of 1933 (hereinafter Securities Act), 15 U.S.C. 77q; Section 10(b) of the Securities Exchange Act of 1934 (hereinafter Exchange Act), 15 U.S.C. 78j; Section 13(d) of the Exchange Act, 15 U.S.C. 78m; Sections 14(a) and (e) of the Exchange Act, 15 U.S.C. 78n(a) and (e), and Rules 10b-5, 14a-3, and

14a-9, 17 C.F.R. 240.10b-5, 240.14a-3, and 240.14a-9, which were promulgated by the Securities and Exchange Commission (hereinafter S.E.C.) under the Exchange Act.

On October 17, 1975, the action was transferred to this Court. On October 19, 1976, the plaintiffs filed their first amended complaint. Jurisdiction over this matter was asserted under Section 27 of the Exchange Act, 15 U.S.C. 78aa, and under the principle of pendent jurisdiction.

In this Court's order of September 29, 1977, plaintiffs' state common law claims, brought under pendent jurisdiction, were dismissed. Plaintiffs filed their second amended complaint on October 18, 1977.

On June 8, 1978, as modified on July 12, 1978, this Court certified

plaintiffs' action under Count I as a class action under Rule 23, Fed. R. Civ. P. The class was certified to consist of all persons who owned shares of common stock in Midwest Rubber Reclaiming Company on March 20, 1975, and who did not sell or exchange their stock during the period that the March 20, 1975, tender offer was outstanding (that is, up to and including May 30, 1975) and who did not sell their stock pursuant to the December 8, 1975 cash tender offer which expired on December 28, 1975.

The alleged violations of the federal securities laws in this case arise in the context of a series of exchange offers and merger proposals concerning defendants Midwest and Midcon. The following facts and allegations, which for the purpose of considering the motion for summary judgment are resolved in favor of

the plaintiffs, regarding the exchange offers and merger proposal and finally the actual merger are relevant to the defendants' motion for summary judgment.

Plaintiffs allege that defendant Midcon is incorporated under and exists by virtue of the laws of the State of Delaware, and that at the time of the exchange offer described herein, Midcon owned at least 226,076 shares of common stock of Midwest, which constituted at least fifty-one percent of the outstanding voting shares of Midwest prior to the exchange offer and which constituted at least seventy-two percent of the outstanding voting shares of Midwest after the consummation of the exchange offer. Midcon after the exchange offer allegedly owned 82.4 percent of the common stock of Midwest. Plaintiffs claim that, at all times

relevant herein, defendant Cohen (whose interest in the company, aggregated with his sister's, amounts to owning 70 percent of the stock of Midcon) was chairman of the board of both Midwest and Midcon, and president of Midcon; Weissman was a director of Midwest, and vice president and secretary of Midcon; Totsch was a director and the president of Midwest; Stanley Kreitman was a director of Midwest; Miller was a director of Midwest and vice president of Midcon; and J. Baxter Brinkmann, a former director of Midwest. The earlier claims against Eugene Williams, Jr., Howard R. Erwin, and Basil Georges are not included in the second amended complaint.

Plaintiffs claim that sometime prior to April 9, 1974, defendants Midcon, Cohen, Weissman, Miller, and others unknown to plaintiffs, conspired to gain sufficient control of Midwest so as to appropriate the

assets of Midwest for the benefit of Midcon. Plaintiffs claim that, in furtherance of this alleged conspiracy, Midcon purchased 226,076 shares of Midwest's common stock between April 9, 1974, and September 30, 1974.

Of these 226,076 shares, 220,776 shares were allegedly acquired in private transactions between April 9, 1974, and September 30, 1974, at a price stated by Midwest in the exchange offer to be $15.00 per share. The remaining 5,300 shares were allegedly acquired by Midcon on the open market between April 19, 1974, and July 8, 1974, at market prices ranging from $12.125 to $13.00. In connection with these purchases, Midcon filed with the Securities and Exchange Commission schedules, pursuant to Rule 13d-1. The first of these was filed on April 18, 1974.

It is alleged that during the period of Midcon's private transaction purchases, the price of Midwest ranged from $7.375 to $13.75 per share; thus, the private sellers of Midwest shares to Midcon allegedly received premiums ranging from $1.25 up to $7.625 per share over the then current market price. At least two of the sellers of Midwest shares to Midcon were allegedly directors of Midwest at the time of the sales, and a third seller was a company affiliated with Brinkmann. No director transferred a controlling block of stock of Midwest to Midcon. Brinkmann and each selling director allegedly resigned their positions as directors of Midwest in favor of nominees of Midcon immediately after the sale of Midwest shares to Midcon. Plaintiffs claim that the acquisitions of the Midwest stock were directed by Cohen as Midcon's controlling stockholder, and were effected in furtherance of the personal

interests of Cohen, rather than the benefits of the minority stockholders of Midcon.

Defendants Cohen and Weissman were elected to the board of directors of Midwest on April 17, 1974, and defendant Miller was elected to Midwest's board on June 3, 1974. These elections were allegedly made possible by the vacancies created on the Midwest board by the "buy-outs" referred to above. Plaintiffs claim that on September 10, 1974, Cohen and the other individual defendants caused Midwest to announce a plan which provided for the issuance of Midwest's twelve percent subordinated debentures, due 1995, in the principal amount of $12.00, in exchange for each outstanding share of Midwest common stock not held by Midcon.

On September 23, 1974, Midcon filed an amendment to its schedules, pursuant to Rule 13d-1, with respect to its stockholdings of Midwest, wherein Midcon allegedly noted: (1) the pendency of an exchange offer by Midwest; (2) that the effect of the offer would be to increase Midcon's percentage ownership of the common stock of Midwest; and (3) that "should all the shares of the common stock of Midwest not be tendered pursuant to the exchange offer, Goodrich Realty [Midcon] may purchase additional shares of Midwest common stock or merge Midwest into Goodrich Realty or a subsidiary thereof."

Plaintiffs allege that in furtherance of the defendants' conspiracy to appropriate the assets of Midwest for the benefit of Midcon and to the economic detriment of members of the class, the individual defendants caused Midwest to

circulate to members of the alleged class its 1975 proxy. Plaintiffs claim that the 1975 proxy was false and misleading, and in violation of Section 14(a) of the Exchange Act, 15 U.S.C. 78n(a), and Rules 14a-3 and 14a-9 thereunder, 17 C.F.R. 240.14a-3 and 240.14a-9.

On March 20, 1975, Midwest made the exchange offer to its stockholders providing for the exchange of each share of Midwest common stock for a $12.00 principal amount twelve percent subordinated debenture of Midwest. The offer, after an extension, was terminated May 30, 1975. The closing price of Midwest on the American Stock Exchange on May 19, 1975, was allegedly $7.375. Plaintiffs claim that the market valued each $12.00 principal amount twelve percent subordinated debenture at approximately $7.375, because it was possible on that date to purchase Midwest

common stock in the market for that price and tender it for exchange pursuant to the exchange offer. The plaintiffs note that $7.375 is substantially less than: (1) the net current asset value per common share of Midwest, which was $13.14 on October 31, 1974; (2) the net book value per common share of Midwest, which was $23.29 on October 31, 1974; and (3) the price paid months earlier by Cohen, or Midcon, to the selling directors for their shares, $15.00. The remaining shares of Midwest stock continued to be traded at this depressed level, and were allegedly quoted on the date of this complaint at a bid of $8.40. Plaintiffs claim that the purpose of the exchange offer was to permit Midcon to operate Midwest for the primary or sole benefit of Cohen and Midcon.

Plaintiffs allege that the exchange offer sought to purchase 211,057

shares of Midwest, all the outstanding shares not then owned by Midcon, and by the terms of the offer, if 155,000 shares were tendered, Midwest was under an obligation to accept those shares tendered. The result of the tender of 155,000 shares of Midwest would have allegedly left less than 56,000 shares of Midwest in the hands of the public. Further, plaintiffs claim that Midwest was listed on the American Stock Exchange prior to the exchange offer, but that since an aggregate of 126,692 shares of Midwest were tendered and accepted pursuant to the offer, Midwest fell below the criterion for listing on the American Stock Exchange, and its common stock was delisted on July 28, 1975.

Plaintiffs claim that Midcon and the individual defendants have threatened to have Midwest merged into Midcon (see below), or a subsidiary thereof, unless

Midwest, through a tender offer, buys up enough shares to give Midcon an eighty percent interest in the outstanding shares. The exchange offer allegedly stated that it was the present intention of Midwest's board of directors to increase the dividends on the common stock after the completion of the exchange offer. However, plaintiffs allege Midcon subsequently caused Midwest to enter into loan agreements which restricted or eliminated funds available for the payment of dividends to Midwest stockholders. Plaintiffs contend that this conduct constitutes violations of Sections 14(a) and 14(e) of the Exchange Act, 15 U.S.C. 78n(a) and 78n(e), and Rules 14a-3 and 14a-9 thereunder, 17 C.F.R. 240.14a-3 and 240.14a-9.

Plaintiffs allege that defendants, individually, in concert, and in aiding and abetting of one another, have

made untrue statements of material facts, and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; plaintiffs further allege that defendants have engaged in fraudulent, deceptive, and manipulative acts and practices in connection with the exchange offer and the subsequent exchange of the debentures for the common stock previously held by those receiving the offering circular. Plaintiffs claim that this alleged conduct constitutes violations of Section 14(e) of the Exchange Act, 15 U.S.C. 78n(e).

Plaintiffs further allege that the offering circular accompanying the exchange offer stated that participation in the offer was "completely voluntary" and that this was false and misleading, as shareholders were unwillingly forced to

either give up their equity or remain stockholders in a delisted company with a large debt, subject to merger, not subject to S.E.C. disclosure requirements and being abused to the benefit of Midcon, all of which was allegedly objectively unfair as forcing a change in the form of the stockholder's investments, as well as the value.

In support of plaintiffs' derivative action brought on behalf of Midwest, plaintiffs allege that a demand upon the directors of Midwest to take remedial steps to rectify plaintiffs' alleged injury would be futile, since Midwest is controlled by the defendants and has allegedly indicated that it believes that its conduct violates no law or statute. Plaintiff further alleges that this Court has jurisdiction over this claim under Section 27 of the Exchange Act, 15

U.S.C. 78aa, as an action to rectify violations of the Exchange Act and the rules promulgated thereunder, and under the doctrine of pendent jurisdiction.

Additionally, plaintiffs allege that the acts of the defendants were taken at the expense of Midwest and for the benefit of the individual defendants and Midcon, and in taking such actions, the defendants have violated Section 17(a) of the Securities Act, 15 U.S.C. 78n(a), Section 10(b) of the Exchange Act, 15 U.S.C. 78j, and the rules promulgated thereunder.

Plaintiffs also claim that the Schedule 13(d) statement filed by Midcon was false and misleading, and contained mate- rial omissions and, therefore, amounted to a violation of Section 13(d) of

the Exchange Act, as well as the rules promulgated thereunder.

Plaintiffs seek monetary damages for all the members of the class equivalent to the $15.00 per share received by the selling directors, as well as alternative damages and injunctive relief.

Subsequent to the exchange offer, Midwest, on December 8, 1975, made a separate and distinct cash tender offer to its public shareholders to purchase a certain number of shares of its outstanding stock at $9.25 per share. Those shareholders who tendered pursuant to this offer were eliminated from the class action. Those plaintiffs who remain as part of the class chose not to tender their Midwest stock and do not challenge the legality of that tender offer.

On March 15, 1978, the common shareholders of Midwest voted upon and approved a merger wherein each outstanding share of Midwest common stock not owned by Midcon was converted into a $45.00 principal amount Midwest 10 percent subordinated debenture due 1998. An investment banking firm has submitted its opinion that this debenture has a present market value of $40.00. The legality of this merger is not challenged by the plaintiffs.

Defendants have moved for summary judgment on Count I on the basis that plaintiffs have sustained no damages from the complained of actions in that they have already received and are entitled to receive for their as yet untendered stock a debenture worth well in excess of the $15.00 per share that plaintiffs seek for their stock in the complaint. Defendants move for summary judgment on Count II on

the basis that as a result of the unchallenged merger between Midwest and Newco, Inc., a wholly owned subsidiary of Midcon, there have been no public shareholders of Midwest since March 15, 1978. Thus, plaintiffs, no longer being public shareholders of Midwest have no interest or standing to seek any derivative relief on behalf of Midwest, and the plaintiffs would not benefit from any such relief.

Plaintiffs oppose summary judgment on Count I on the basis that their damages from the alleged fraud should be measured as of 1975, the date the fraud was made public or when a reasonable plaintiff did or should have discovered the wrongdoing. Plaintiffs argue that a 1978 debenture is irrelevant to the measure of damages and should be disregarded. Plaintiffs also oppose summary judgment on Count II on the basis that the forced

exchange of their shares of Midwest (plaintiffs have not as of yet tendered all of their shares) for debentures does not deprive them of standing to pursue a derivative suit on behalf of Midwest.

In order for summary judgment to be granted, the movant must clearly establish that there exists no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Alcala v. Burns, 545 F.2d 1101, 1106 (8th Cir. 1976), cert. denied sub nom., Doe v. Burns, 431 U.S. 920 (1977).

In order to successfully maintain an action under the federal securities laws a party must show damages as a result of the complained of act. See Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); Mills v. Electric Auto-Lite, 396

U.S. 375, 389 (1970). Securities Exchange Act of 1934, 10b, 15 U.S.C.A. 78j(b).

Section 28(a) of the Securities Exchange Act, 15 U.S.C.A. 78bb(a), provides that "no person permitted to maintain a suit for damages under the provisions of this chapter shall recover . . . a total amount in excess of his actual damages on account of the act complained of." Where plaintiffs are sellers of securities, as in this case, the measure of damages in a case alleging fraud under the securities laws is "the difference between the fair market value of their [sellers'] shares at the time they were sold less the amount they received for their shares." Ehrler v. Kellwood Company, 391 F. Supp. 927, 930 (E.D. Mo.), aff'd, 521 F.2d 1347 (8th Cir. 1975). Under this formulation of the measure of damages, plaintiffs clearly can establish no damages under Count I of the

second amended complaint. Plaintiff's claim of damages, the difference between $15.00 and $7.375 for shares of stock not sold in 1975, is clearly obviated by the amount they will receive/received at the time of sale (a result of the merger), a $45.00 principal amount 10 percent subordinated debenture due 1998 which was valued at approximately $40.00 on the date of the merger. Accordingly, as a result of the merger which has come about since plaintiffs' filing of their second amended complaint, the legality of which is not challenged, the plaintiffs became entitled to receive a debenture worth more than the amount they claim they were damaged. Plaintiffs have set forth no other claimed damages to raise a question of fact that they are damaged as a result of the merger and conversion of their stock into debentures. Plaintiffs' theory that damages should be measured as of 1975--the

difference between the $15.00 offered to the directors in 1974 and the value of debentures offered to them in 1975, $7.375--the date the fraud was made public or when a reasonable plaintiff did or should have discovered the wrongdoing, is inapplicable, as this is a measure of damages involving defrauded buyers. Harris v. American Investment Company, 523 F.2d 220 (8th Cir. 1975).

As plaintiffs are sellers and not buyers of securities, as set out in the class action certification, the measure of damages as set out in Ehrler is applicable, and under that standard plaintiffs have shown no damages. As no question of fact remains with respect to Count I, defendants are entitled to summary judgment as a matter of law. Affiliated Ute, supra.

Count II of plaintiffs' second amended complaint purports to assert a derivative action on behalf of Midwest. Although the Court agrees with plaintiffs that they are not deprived of their capacity to sue derivatively by reason of the merger, the Court finds that plaintiffs are unable to maintain their action under Count II because no damages can be shown to the corporation. Plaintiffs have not challenged the validity of the merger between Newco, Inc. and Midwest. As set out above, the Court finds as a matter of law that the shareholders of Midwest have also sustained no damages. Accordingly, summary judgment for defendants is appropriate as to Count II as no damages can be shown. Rule 56(b), Fed. R. Civ. P.

Dated this 2nd day of May, 1979

U.S. District Judge

Supreme Court, U. S.
FILED
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No. 80-625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALVIN J. SHAPIRO, *et al.*,
Petitioners,

vs.

MIDWEST RUBBER RECLAIMING COMPANY, MIDCON INDUSTRIES, INC., f/k/a GOODRICH REALTY AND DEVELOPMENT GROUP, INC., CARL H. TOTSCH, RICHARD M. COHEN, MORRIS WEISSMAN, MICHAEL MILLER AND STANLEY KREITMAN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Page

THE QUESTION PRESENTED FOR REVIEW WAS NEITHER DECIDED NOR EXAMINED BY EITHER COURT BELOW AND WAS EXPRESSLY REJECTED BY THE EIGHTH CIRCUIT AS GROUNDS FOR ITS DECISION WHICH WAS BASED ENTIRELY ON PETITIONERS' LACK OF DAMAGES AND THE LACK OF UNFAIRNESS IN THE GOING-PRIVATE MERGER 1

The Court Of Appeals' Decision Was Based On Petitioners' Lack Of Damages And Lack Of Unfairness In The Going-Private Merger 2

Certiorari Is Plainly Inappropriate 6

CONCLUSION 9

TABLE OF AUTHORITIES CITED

Cases:

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) 6

Harris v. American Investment Co., 523 F.2d 220 (8th Cir. 1975), cert. denied, 423 U.S. 1054 (1976) 4,5

Lawn v. United States, 355 U.S. 339 (1958) 6

Lewis v. McGraw, 619 F.2d 192 (2d Cir.), cert. denied, 49 U.S.L.W. 3332 (Nov. 3, 1980) 7,8

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 5

Nye v. Blyth Eastman Dillon & Co., Inc., 588 F.2d 1189 (8th Cir. 1978) 4,5

Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) . 5

Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir.), cert. denied 419 U.S. 873 (1974) 7

Stull v. Bayard, 561 F.2d 429 (2d Cir. 1977), cert. denied, 434 U.S. 1035 (1978) 7,8

United States v. Ortiz, 422 U.S. 891 (1975)..... 6

Statutes and Rules:

15 U.S.C. §78 n(e) [Williams Act, Section 14(e)] 1,2,6,7,8

F.R.A.P. 40 (a) 7

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Petitioners frame the issue in this case as follows:

> Do non-tendering shareholders *who were damaged,* but did not trade or rely on material misstatements, omissions and market manipulation by the offeror, have a cause of action under Section 14(e) of the Williams Act, 15 U.S.C. §78n(e). [emphasis added].

Petition at ii.

Petitioners' formulation of the question presented for this Court's discretionary review *presumes the fact of damage* to Petitioners in direct conflict with the holding of the Court of Appeals and seeks this Court's determination of an issue not raised by this case: shareholder *standing* under Section 14(e) of the Williams Act, 15 U.S.C. §78n(e).[1]

This standing issue was neither decided nor examined by either the District Court or the Court of Appeals nor was it necessary to either court's decision. Indeed, the Court of Appeals specifically determined that the question of standing was not before it, finding the resolution of the standing issue unnecessary in light of the fact that Petitioners simply had suffered no damages from the acts of which they complained. For these reasons and those more fully developed below, Respondents submit that the Petition for Certiorari should be denied.

The Court Of Appeals' Decision Was Based On Petitioners' Lack Of Damages And Lack Of Unfairness In The Going-Private Merger

In 1973, the Shapiros purchased 800 shares of Midwest stock for a total of $9,144.10. Petitioners do not allege that this purchase was tainted by any illegality. In 1974 and early 1975, Mid-

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[1]In their brief, Petitioners make perfectly clear that standing is the issue which they hope to have this Court decide. For example, see page 30 where Petitioners characterize the issue here as that of "non-tenderer standing". Throughout their brief, Petitioners speak in terms of non-tenderers' "cause of action" and "right to sue", see pp. 16, 17, 18, 20, 24, 25, 27, 28 and 31. As demonstrated *infra*, the Court of Appeals simply did not determine that non-tendering and non-relying shareholders had no standing, no cause of action or could not sue under Section 14(e). Had it done so, the Court would not have embarked upon the lengthy and careful analysis of the "fairness" issue (Pet. App. A at pp. 23-28) and would not have observed that its determination concerning Petitioners' lack of trading or reliance "does not end our inquiry, of course." (Pet. App. A at 22). See also footnote 11 of the Court's opinion (Pet. App. A at 22-23).

con gained control of Midwest Rubber by purchasing shares from various large shareholders of Midwest Rubber at $15.00 per share. In March 1975, Midwest sent an offering circular to its shareholders, announcing an exchange offer consisting of a $12.00 face amount subordinated debenture for each share of stock. The Shapiros did not rely upon the circular and did not sell their shares. Instead, in March 1978, pursuant to an additional offer, the Shapiros exchanged or became entitled to exchange each of their shares for a $45.00 face amount debenture, which they concede was worth at least $40.00. As found by the Eighth Circuit, "[h]aving invested $9,144.10 in Midwest common stock in 1973, they now hold debentures with a face value of $36,000." (Pet. App. A at 12)

Though they neither relied nor traded upon the offering circular, Petitioners assert that the March 1975 circular contained a number of misrepresentations and that, as a result, they are entitled to damages despite the four-fold increase in the value of their investment as of March, 1978.

Throughout this litigation, the Shapiros have measured their claimed damages by the difference between the $15.00 per share price privately offered to the former Midwest directors and the $7.35 per share value Petitioners ascribe to their shares at the time of the alleged fraud.[2] In both the District Court and the Court of Appeals, Petitioners have sought arduously to ignore the relevance of the fact that, as a result of the 1978 offer, they received a debenture worth at least $40.00 for each share of their stock. As a legal basis for disregarding the substantial profit which Petitioners have realized by virtue of their ownership of Midwest shares, they urged the Court of Appeals to invoke the

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[2]In their principal brief in the Court of Appeals Petitioners stated: "The difference between the price which was privately offered to the former directors of Midwest ($15.00) and the true value of the Midwest securities at the time of the fraud ($7.35) is the proper measure of damages." The Eighth Circuit interpreted the Petitioners damage theory accordingly (Pet. App. A at 23).

rules of *Harris* v. *American Investment Co.*, 523 F.2d 220 (8th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) and *Nye* v. *Blyth Eastman Dillon & Co., Inc.*, 588 F.2d 1189 (8th Cir. 1978) and fix their damages in March of 1975—the time of the alleged fraud's commission. Thus, Petitioners argued, the bonanza realized by them in 1978 did not preclude additional recovery.

The Eighth Circuit agreed with Petitioners that the *Harris-Nye* damage formulations do operate to fix damages in a securities fraud case at the time the fraud is committed or reasonably discovered, and that after-fraud fluctuations in the stock's value do not affect the computation of damages. These damage formulations apply what is commonly termed the "second investment decision" rule, and do not require a securities fraud plaintiff to mitigate its damages by either selling or retaining stock after discovery of the fraud. *See Harris* v. *American Investment Co., supra,* 523 F.2d at 228.

Crucial to the application of the "second investment decision" rule, however, is an *initial* investment decision upon which liability or damages can be predicated, and the Court of Appeals so found (Pet. App. A at 21-22). Thus where the wrong alleged has had no effect on a plaintiff's initial investment decision "either directly (through actual reliance) or indirectly (by affecting the market upon which the party traded)" (Pet. App. A at 21), the damage rules of *Harris* and *Nye* have no logical application. Therefore, the Court of Appeals properly determined the *Harris-Nye* damage formulations did not provide a basis for showing damages to the Shapiros or the other members of their class.

Significantly, this was not the end of the Court of Appeals' analysis; rather, the Court searched for some other theory under which the Shapiros might show damages. Before beginning its inquiry, however, the Court had occasion to note:

> We note in passing that there may be some question whether the Shapiros have standing to advance their claim

> under 15 U.S.C. 78n(e) (1976). Cf. *Hundahl* v. *United Benefit Life Ins. Co.*, 465 F.Supp. 1349, 1369 (N.D. Tex. 1979) (denying standing to plaintiffs who clearly did not rely on alleged misrepresentations in the tender offer materials). *Nonetheless, the district court did not consider this issue and it is not before us on appeal.* [emphasis added].

(Pet. App. A at 22-23, n.11).

After this observtion, the Court came to grips with the theory of damages which Petitioners had espoused consistently prior to the Eighth Circuit's ruling against them. That theory, a claim for the alleged "control premium" paid privately to other Midwest shareholders, was properly deemed by the Eighth Circuit to be premised on "some notion of fairness" (Pet. App. A at 23).[3] Noting that a takeover such as the one presented in the instant case raised basic fairness problems in the division of the purchase price among former shareholders, the Court of Appeals recognized that it may inquire into the fairness of the terms of such a transaction to determine the appropriate relief for procedural irregularities such as those alleged by Petitioners (Pet. App. A at 25)[4].

Thus, the Court turned to an analysis of the entire takeover procedure and correctly concluded that the Shapiros were harmed, if at all, only when they were frozen out in 1978 when the takeover was consummated. This observation necessarily followed from the Court's earlier determination that, in the absence of trading or reliance, the *Harris-Nye* damages formulations are logically inapposite. The question of fairness was resolved for the Court of Appeals very simply: First, the Shapiros had never challenged the terms of the going-private

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[3] *Cf. Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977).

[4] *See Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

merger in 1978, (Pet. App. A at 26-27); and second, the substantial profit realized by the Shapiros as a result of the merger rendered an unfairness claim on their behalf suspect. As the Court noted:

> The fact that the Shapiros eventually received a $45 debenture for each share of their Midwest stock suggests the reasonable inference that they can advance no personal claims of unfair treatment in the takeover process.

(Pet. App. A at 27, n.16). As a consequence, the Court concluded that the Shapiros could not show damages resulting from unfairness in the takeover procedure. Only after this determination did the Court of Appeals conclude that the District Court properly entered summary judgment against the Shapiros.

Certiorari Is Plainly Inappropriate

As demonstrated above, the question Petitioners present to this Court is simply not an issue in this case. It is, therefore, not a proper subject for review.

Even if the issue of standing under Section 14(e) of the Williams Act were somehow involved in this litigation, discretionary review would still be inappropriate in light of the cardinal principle that this Court will not consider issues in a vacuum without the benefit of analysis by the courts below. *See, e.g. Lawn* v. *United States,* 355 U.S. 339, 362-363, n.16 (1958); *see also United States* v. *Ortiz,* 422 U.S. 891, 898 (1975); *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147, n.2 (1970). The Court of Appeals specifically determined that the standing issue was not before it on appeal, and, because it had not been raised at the District Court level, no analysis of this issue by either court below exists to assist this Court in its deliberations. Nor can any discussion of the issue be found in the briefs filed by the

parties prior to the Eighth Circuit's ruling on the merits.[5] Under these circumstances, certiorari should not issue.

Finally, even if the question of standing under Section 14(e) of the Williams Act had been addressed and decided by the Court of Appeals, the supposed "conflict among the Circuits" described by Petitioners is more illusory than real.

Petitioners contend that the Eighth Circuit's decision is at odds with the holdings of the Fifth Circuit in *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579 (5th Cir.), *cert. denied* 419 U.S. 873 (1974) and the Second Circuit in *Stull* v. *Bayard*, 561 F.2d 429 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).[6] Respondents are loath to address the non-issue of standing under 14(e) and create the impression that this question is somehow involved in this case. Suffice it to note that the Fifth Circuit specifically stated that its holdings in *Smallwood* did not require it to consider "questions of reliance, causation, and the appropriate measure of damages," 489 F.2d at 608, and that the

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[5]Petitioners first raised the issue they now present to this Court in their Petition for Rehearing. That Petition was denied (Pet. App. B) without a request for briefing from Respondents by the Court of Appeals. See F.R.A.P. 40(a).

[6]In the brief which Petitioners originally filed with this Court, Petitioners had argued that a conflict existed between Eighth and Second Circuits on the one hand and the Third and Fifth Circuits on the other. This argument was the result of Petitioners' mistaken assumption that *Stull* v. *Bayard, supra,* was a Third Circuit case. Thus, Petitioners originally concluded, the recent ruling of the Second Circuit in *Lewis* v. *McGraw*, 619 F.2d 192 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3332 (November 3, 1980) (holding reliance an essential element of a cause of action under 14(e)) "would have come as a surprise to the panels of the Third and Fifth Circuits." Because *Stull* is a Second Circuit case, perhaps it is Petitioners and not the Third and Fifth Circuits who are surprised. Respondents have been informed that Petitioners intend to recall their brief for correction.

Second Circuit's decision in *Stull* was based entirely on the fact that plaintiff's claim was time-barred. The Second Circuit's discussion of standing under 14(e) in *Stull* was mere dictum, premised on the stated assumption that the plaintiff had a right to sue. 561 F.2d at 432-33. Moreover, that Circuit's most recent pronouncement concerning reliance under 14(e) in *Lewis* v. *McGraw,* 619 F.2d 192 (2d Cir.), *cert. denied,* 49 U.S.L.W. 3332 (Nov. 3, 1980) is in perfect harmony with Petitioners' characterization of the Eighth Circuit's holding in the instant case. See note 6, *supra.*

CONCLUSION

For the reasons set forth above, Respondents submit that the Petition for Certiorari should be denied. Though Petitioners angle masterfully in search of discretionary review, they bait the hook with red herring.

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No. 80-625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALVIN J. SHAPIRO, et al.,
Petitioners,

vs.

MIDWEST RUBBER RECLAIMING COMPANY, MIDCON INDUSTRIES, INC., f/k/a GOODRICH REALTY AND DEVELOPMENT GROUP, INC., CARL H. TOTSCH, RICHARD M. COHEN, MORRIS WEISSMAN, MICHAEL MILLER AND STANLEY KREITMAN,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

		Page
I.	Under Applicable Legal Principles, Petitioners were Damaged by Respondents' Fraudulent Conduct and, therefore, have Standing Under 14(e)	1
II.	The Issue of Standing Under 14(e) Is Properly Before the Court . . .	4
III.	As One of the Few Remaining Implied Rights of Action under Federal Securities Law, 14(e) Should Be Evenhandedly Applied to Both Tendering and Non-Tendering Shareholders	5

TABLE OF AUTHORITIES

CASES:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 5

Electronic Specialty Co. v. International Controls Corp., 409 F. 2d 937 (2d Cir. 1969) 3

Hundahl v. United Benefit Life Insurance Co., 465 F. Supp. 1349 (N.D. Tex. 1979) 2

Kessler v. Strecker, 307 U.S. 22 (1939) 5

Lawn v. United States, 355 U.S. 339, reh. denied, 355 U.S. 967 (1958) 5

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 6

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 6

United States v. Ortiz, 422 U.S. 891 (1975) 5

STATUTES

15 U.S.C. §78n(e) . . . . . passim

MISCELLANEOUS

R. Phillips & M. Miller, "The Demise of Implied Rights," 13 Review of Securities Regulation 887 (August 27, 1980) . . . 6

No. 80-625

In The

SUPREME COURT OF THE UNITED STATES

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Midwest Rubber Reclaiming Company, Midcon Industries, Inc., f/k/a/ Goodrich Realty And Development Group, Inc., Carl H. Totsch, Richard M. Cohen, Morris Weissman, Michael Miller And Stanley Kreitman,
Respondents.

Petitioners' Reply to Respondents' Brief in Opposition to Petition for a Writ of Certiorari

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I. Under Applicable Legal Principles, Petitioners Were Damaged by Respondents' Fraudulent Conduct and, therefore, have Standing Under 14(e)

In their Brief in Opposition to Petition for Certiorari, Respondents merely repeat the Eighth Circuit's *ipse dixit* when they state that because Petitioners suffered no damages, they lack "standing." However, use of these labels is misleading without further analysis, which both the Eighth Circuit and Respondents avoid. The legal issue squarely presented but not met by either the Eighth Circuit or Respondents is whether damages are available to non-tendering shareholders in a tender offer situation.

When Respondents made the challenged tender offer, the price which could be realized for Petitioners' Midwest shares -- and, by definition the value of the shares -- was diminished due to the depressing effect of the fraudulent offer and the adverse impact

on Midwest itself occasioned by the success of the offer. Under ordinary principles, damages in such situations exist if, due to misconduct of the offeror, the stock of non-tenderers is depressed below the value it would have had if no fraud had occurred. Such damages are determined at the time of the fraud or its reasonable discovery. If damage, i.e., value depression, exists at that time, then later events, such as the fortuitous subsequent debenture offer here, have no legal effect upon the shareholders' right to sue.

Respondents' reliance on the Eighth Circuit's reference to Hundahl v. United Benefit Life Insurance Co., 465 F.Supp. 1349 (N.D. Tex. 1979), and its statement that the standing issue was not presented, is simply a variation of the basic misconception permeating the Court of Appeals' decision. Damages caused by Respondents' fraudulent scheme result from diminution in share value

at the time of the wrongful conduct (or its discovery), whether shares are tendered or not, and not from the non-tendering shareholders' reliance or non-reliance on the fraud.[1] Thus, even though the Eighth Circuit said that it chose not to reach the question of whether a non-relying plaintiff in a 14(e) case has standing, it failed to recognize that it established a rule which denies standing to a non-tendering plaintiff despite well founded allegations of causation and damages. This is the issue which is at the heart of this Petition.

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1. Reliance cannot be a prerequisite to recovery under 14(e) because the non-tenderer is, by definition, a non-relier. Requiring reliance is tantamount to requiring tender, something even Respondents concede is not the law. See, Electronic Specialty Co. v. International Controls Corp., 409 F. 2d 937 (2d Cir. 1969), relied on by Hundahl, 465 F. Supp. at 1368, where the Court held that the damage which required extending 14(e) to non-tenderers is diminution in share value. Such damages are not due to "reliance," but, instead, to the retention of stock of diminished value caused by the offeror's fraudulent conduct. The search for a relying non-tenderer, which is mandated by the Eighth Circuit's decision, must inevitably be fruitless.

II. The Issue of Standing Under 14(e) is Properly Before the Court

Respondents argue that because standing under 14(e) did not emerge as a pertinent issue until after the Eighth Circuit's opinion was rendered, when Petitioners argued the point in their Petition for Rehearing, that issue is insulated from certiorari review. Obviously, Respondents are in error. Carried to its logical conclusion, Respondents' position means that every reviewable court decision based, as here, on new, unargued grounds raised for the first time by the reviewing court (and thereafter in the petition for rehearing), is immune from review and stands -- albeit erroneously -- as the law of the land. Not only was the present issue raised below, but, this Court can, and does, consider issues not even raised below, as well as issues not even contained in the Petition for Certiorari, where, as here, the issues raised by the reviewing

court are of sufficient importance. Kessler v. Strecker, 307 U.S. 22,34 (1939). Clearly, certiorari review is appropriate where the issue was raised below, is the principle issue upon which the Court below rested its decision and is the issue upon which review is sought.2

III. As One of the Few Remaining Implied Rights of Action Under Federal Securities Law, 14(e) Should be Evenhandedly Applied To Both Tendering and Non-Tendering Shareholders.

This case involves an implied right of action under 14(e) of the Securities Exchange Act of 1934. Recently, this Court has

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2. The Respondents' cases are inapposite, as befits their argument. In Lawn v. United States, 355 U.S. 339, reh. denied, 355 U.S. 967 (1958), the Court denied review on an issue not raised before the lower court and not mentioned in the certiorari petition. In United States v. Ortiz, 422 U.S. 891 (1975), the Court denied review of an issue that was specifically disavowed by the party seeking to raise it before the Court. The decision not to review in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), was based on the petitioners' abandonment in the appellate court of an issue ruled on by the district court.

strictly limited such implied rights of action. Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979). Perhaps the only implied right of action remaining viable under the federal securities is, as this Court noted in Touche Ross & Co. v. Redington, supra, at 577 n.19, the well established action available under 10(b), of which 14(e) is the exact tender-offer counterpart. R. Phillips & M. Miller, "The Demise of Implied Rights," 13 Review of Securities Regulation, 887 (August 27, 1980). Since the implied right of action under 14(e) is available to shareholders, it must be applied evenhandedly and in a nondiscriminatory fashion to non-tendering shareholders harmed by fraudulent conduct as well as to shareholders who do tender or trade.

Conclusion

For the foregoing reasons, and those set forth in the Petition for a Writ of Certiorari, a writ of certiorari should issue to the United States Court of Appeals for the Eighth Circuit to review the judgment entered by that Court in this case.

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CERTIFICATE OF SERVICE

I, Lowell E. Sachnoff, counsel for Petitioners, hereby certify that on December 6, 1980, true and correct copies of the foregoing Reply were served on all parties required to be served by mailing copies to counsel for all parties as listed on the attached Service List via first class mail, postage fully prepaid.

Dated: December 6, 1980

LOWELL E. SACHNOFF